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OFFICE OF ADMINISTRATIVE HEARINGS
08/12/2019 4:56 PM

STATE OF NORTH CAROLINA

COUNTY OF DARE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
18 EHR 07390 & 18 EHR 07391

Gwendolyn Smuts, Petitioner, v. North Carolina Department of Environmental Quality, Respondent and 134 Ocean Boulevard, LLC Respondent-Intervenor.	)	**18 EHR 07390**
Marvin Tignor, Petitioner, v. North Carolina Department of Environmental Quality, Respondent and 98 Ocean Boulevard, LLC, Respondent-Intervenor.	)	**18 EHR 07391**

FINAL DECISION *by* SUMMARY JUDGMENT

THIS MATTER is before the undersigned on the *Respondent's Motion for Summary Judgment*, and *Memorandum in Support of Motion for Summary Judgment in Consolidated Cases*; *Respondent-Intervenors' Response and Consent to Respondent's Motion for Summary Judgment; Petitioner's Response to Respondent's Motion for Summary Judgment, including a Motion seeking Summary Judgment in Petitioners' favor*; *Respondent's Supplemental Submission in Support of Motion for Summary Judgment in Consolidated Cases*; and, *Additional Authority Submitted in Support of Respondent's Motion for Summary Judgment in Consolidated Cases*. By agreement, parties were heard in oral argument in Raleigh.

RECITATION OF UNDISPUTED FACTS

1. The Outer Banks community of Southern Shores is located on Bodie Island, by the Currituck Sound, between Kitty Hawk and Duck, and covers 2,175 acres. It has 2,819 year-round residents, and an estimated summer peak population of 8,011.[1]

2. Petitioners Gwendolyn Smuts and Marvin A. Tignor, residents of the Town of Southern Shores, filed separate Petitions on December 5, 2018 against the Respondent N.C. Department of Environmental Quality (hereinafter, "DEQ"), alleging that its Division of Coastal Management ('DCM') acted erroneously and/or failed to act as required by law or rule when it permitted the "issuance of a CAMA [Coastal Resources Management Act] permit that is inconsistent with the land-use plan of Southern Shores" for construction by the Intervenors on lots near to their respective houses, which "harms the Petitioner[s'] use and enjoyment" of their residences "as well as [their] value."

3. Respondent questions Ms. Smuts standing because her mother owns the house she resides in across the street from 134 Ocean Boulevard. She also co-owns an undeveloped lot with her brother at 131 Ocean Boulevard, adjacent to her mother's property.[2]

4. The Intervenors are limited liability corporations owned by SAGA Construction Co. holding title to the lots identified in their names. The Intervenors were required to obtain the "minor development" permits[3] conforming to the Coastal Area Management Act ("CAMA") because their parcels were located in an "area of environmental concern" ("AEC"). "Minor development" permits are applicable to proposed structures not exceeding 60,000 square feet, on sites of less than 20 acres, and are granted by local authorities. N.C.G.S. § 113A-118(b) and (d)(2). The location fell into the ocean hazard category, *i.e*., beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage. N.C. Gen. Stat. § 113A-113; 15A NCAC 07H .0301.

5. To obtain the building permits at issue, the owners were required to acknowledge receipt of an "Ocean Hazard AEC Notice," warning of estimates that the average beach erosion rate where the lots are located was 2 feet per year; that the shoreline could move 35 feet landward in a major storm; that the location was subject to "sudden and massive storms," that a major storm could predictably cover the lots in 12 feet of water; and, that the owners would be responsible for removing their structures within two years of becoming "eminently" threatened by destruction due to erosion, "and in any case upon [their] collapse or subsidence."[4]

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[1] Town of Southern Shores CAMA Land Use Plan (hereinafter, "Land Use Plan" or "LUP"), at pgs. 8 and 18, appearing in the record as "Exhibit G" to the Respondent's *Memorandum in Support of Motion for Summary Judgment in Consolidated Cases* ("Memo, Ex G p 18"). Page numbers herein refer to the document's position in the parties' electronic filings.

[2] Memo, p 13.

[3] Memo, Ex M p 150 & Ex N p 152.

[4] Memo, Ex I p 104 & Ex J p 121.

6. The permits were issued by a CAMA Local Permit Officer ("LPO") employed by the Town of Southern Shores, Dabni Shelton.[5] However, CAMA requires that all county and city land use ordinances and "[a]ll local land-use plans … within the coastal area" must be approved by the Coastal Resources Commission, and "shall be consistent with State guidelines prepared and adopted" by the Commission, with the assistance of the Respondent; and, that "[n]o permit shall be issued … which is inconsistent with State guidelines." N.C. Gen. Stat. §§ 113-107(b); 113-108; 113-110(f); 113-111; 15A NCAC 07A .0101(a). Respondent also distributes funds to localities to ensure that they can afford to exercise their "permit-letting authority" and "undertake a Coastal Area Management Act local implementation and enforcement program." 15A NCAC 07I .0102. During her evaluation of the Intervenors' permit applications, LPO Shelton "conferred" with a DCM field representative to determine whether the site plans "met the CAMA requirements regarding oceanfront setbacks."[6]

7. The Respondent and Intervenors contend that the Town of Southern Shores correctly applied its Zoning Ordinance 2016-01-04, Article III, to the two lots in controversy. It defines a "family" dwelling as encompassing a "dwelling unit being used as a vacation rental[.]" It sets out the requirements for the building in a "RS-1 District," as summarized in Table 20 of the Town's CAMA Land Use Plan ("LUP"), *i.e.*, a minimum 20,000 square-foot lot, with a single dwelling unit, of no more than 35 feet in height, which covers no more than 30% of the lot.[7] The ordinance was amended in 2016 following the Legislature's adoption of restrictions on local zoning requirements for certain residential "building design elements," including the elimination of limits on "the number and types of rooms." N.C. Gen. Stat. § 160A-381(h). Southern Shores changed the requirements for each of its residential districts by deleting "no more than seven bedrooms or septic system capacity for more than 14 people," and substituting the restriction that a residential "dwelling shall not exceed 6000 ft. of enclosed living space."[8] The amending ordinance included a statement, as required by N.C. Gen. Stat. § 160A-383(b)(1), describing the amendments' "consistency with an adopted comprehensive plan and explaining why the action taken [was] reasonable and in the public interest."[9] At the time the ordinance was amended, there were 15 dwellings built between 1965 and 2015 in Southern Shores exceeding 6000 ft. -- four of them on Ocean Boulevard -- with 4 to 7 bedrooms each. Two smaller homes on Ocean Boulevard had nine bedrooms.[10]

8. The permit for 98 Ocean Boulevard Drive proposed to replace a 989 sq. ft. one-story house, covering 11% of the 35,262 sq. ft. lot with about 90 feet of beach frontage, with a 6,105 sq. ft., 34' 3" tall building on 29.2% of the lot. The existing 1,237 sq. ft. house at 134 Ocean Boulevard Drive took up 17% of its 36,925 sq. ft. lot, which had about 100 feet of beach frontage.

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[5] Memo, p 30, 33 & 36-37.
[6] Petitioner's *Response to Respondent's Motion for Summary Judgment*, Exhibit K, "Respondent Department of Environmental Quality's Response to Petitioner's First Set of Interrogatories, Request for Admissions and Request for Production of Documents," p. 44 (hereinafter, "Response, p 44").
[7] Response p 14/44; Memo, 36-37; Memo, Ex G p 64-65; Memo, Ex L p 143-149.
[8] Memo, Ex L *Ordinance 2016-01-04 - An Ordinance Amending the Code of Ordinances of the Town of Southern Shores*, *North Carolina*, p 144-45, and 146-47.
[9] Memo, Ex L p 144-45, and 148.
[10] Response, Ex K p 40-42.

The proposed 6,105 sq. ft., 34' 3" high dwelling would cover 28.7% of the lot.[11] The proposed buildings would have the capacity to sleep 24 people in 12 bedrooms.[12]

9. Petitioners do not deny that the proposed structures meet the measurable criteria of the amended Zoning Ordinance. Their complaint is that the proposed buildings are not compatible with an aspiration, as expressed in the Land Use Plan's "Vision Statement" that, "The scale and architecture of new development and re-development is compatible with existing homes." The "Vision Statement" described Southern Shores as "comprised primarily of small low density neighborhoods consisting of single family homes primarily on large lots (*i.e.*, at least 20,000 sq. ft)."[13] In an affidavit appended to Petitioner's response to the summary judgment motion, a 32-year employee of the company that initially developed Southern Shores, and who retired as its President, states that, "Never once in that time was any homesite proposed to be improved with a structure as out of character with the community as those proposed for 98 and 134 Ocean Boulevard." He describes the "vision" of the original developers as "a coastal development that was in harmony with the natural coastal surroundings: with low density that allowed much of the native vegetation to stay and low lying, low-profile homes that blended into the dunes and maritime forests."[14]

10. The Land Use Plan describes tourism as "the driving economic force in the Outer Banks," with "high percentages of employment … attributable to the tourism industry" in Dare County. There are no hotels in the city limits of Southern Shores, but the estimates of building code officials and census data suggests that one third of the houses there are "seasonal rentals."[15] As noted in the Consistency Determination, the LUP recognized in 2012 the emerging trend of "redevelopment of older, single family homes to larger permanent and seasonal rental homes," including "tear downs and increasing land values" in the "NC 12 corridor" [Ocean Boulevard] similar to "neighboring beach communities."[16] It was projected that, "Because the town is close to being built out … development during the planning period is likely to be in the areas of infill and tear down/redevelopment."[17]

11. The Town's Land Use Plan notes in multiple places that it is intended to "provide guidance for … a broad range of policy issues, such as the development of regulatory ordinances;" that the LUP is "not a regulatory mechanism," but "intended as a guide in adopting implementation ordinances;" that it "does not preclude, supersede, negate, or repeal current or future zoning regulations;" and, that the "zoning ordinance is the primary means of regulating land use by the town."[18]

12. To make uniform the law concerning adoption of city codes, all of the State's municipalities having a population of 5,000 or more are required to adopt and issue a code of ordinances. N.C. Gen. Stat. § 160A-77. N.C. Gen. Stat. § 160A-12, titled "Exercise of corporate

[11] *Consistency Determination*, Memo, Ex O p 154-55.
[12] Response Ex B, p 11.
[13] Response p 3; LUP, Memo, Ex G p 8.
[14] Response, Ex A, *"Affidavit of Charles J. "Mickey" Hayes, Jr.*, p 3.
[15] Memo Ex G p 15.
[16] Memo Ex G p 15.
[17] Memo Ex G p 38.
[18] Memo Ex G p 7, 60, and 75.

power," provides that a right or obligation conferred or imposed by a city charter or State law "without directions or restrictions as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the city council." To promote the "health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances." N.C. Gen. Stat. § 160A-381.

13. On October 22, 2018, LPO Shelton and the Intervenors signed the proposed permits and submitted them for approval to the Respondent. The permit forms bore the statement that, "in issuing this permit it is agreed that this project is consistent with the local Land Use Plan and all applicable ordinances."

14. On November 13, 2018, the Respondent issued a "Consistency Determination," noting that "Seven (7) third-party appeals contesting the approved permits" had been submitted to Respondent "asserting that the permits are inconsistent with the local land use plan."[19] The agency found that the permits requested by the Intervenors were not in conflict with the Town's "2012 CAMA Land Use Plan" currently in effect, which had been certified by Respondent at the time of its adoption in 2012. In reaching this decision, Respondent also scrutinized the 2016 ordinance amendments and concluded that they were compatible with the 2012 LUP.[20]

15. Respondent granted the Petitioners' timely filed requests, pursuant to N.C. Gen. Stat. § 113-121.1(b), for permission to appeal the agency's decision in the Office of Administrative Hearings on November 19, 2018.[21]

16. The Petitioners each timely filed their Petitions for a contested case hearing on December 5, 2018.

Based upon the undisputed facts, the undersigned makes the following

CONCLUSIONS OF LAW

1. The Respondent's November 13, 2018 "Consistency Determination" was a prerequisite for the issuance of the disputed building permits by the Town of Southern Shores. N.C. Gen. Stat. § 113-111.

2. Ms. Smuts co-ownership of an adjacent undeveloped lot at 131 Ocean Boulevard supports the Coastal Resources Commission's decision that she was "directly affected" by the decision to grant the permit concerning neighboring property, within the meaning of N.C. Gen. Stat. § 113-121.1(b).

3. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. § 113-121.1(b).

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[19] Consistency Determination, Memo, Ex O p 154.
[20] Memo, Ex O p 156-57.
[21] See Exhibits 1 and 2 to Conner letter attached to *Petitioners' Memorandum in Support of its Rule 56(F) Affidavit and, in the Alternative, Motion for Extension of Time*, at pages 16 and 34 of this e-filing.

4. Chapter 113A, Article 7 "establishes a cooperative program of coastal area management between local and State governments," in which "[l]ocal government shall have the initiative for planning," and "State government shall establish areas of environmental concern." "With regard to planning, State government shall act primarily in a supportive standard-setting and review capacity," and enforcement is "a concurrent State-local responsibility." N.C. Gen. Stat. §113A-101. All permits are issued in "consultation with (but not subject to the veto of) the [Coastal Resources] Commission." N.C. Gen. Stat. §113A-125(b).

5. The Town of Southern Shores, as the permit-letting authority, was obligated to reject the Intervenors' permit applications for development in a "natural hazard area" if it "would occur … in such a manner as to unreasonably endanger life or property;" or, if the proposed development was "inconsistent with the State guidelines or local land-use plans." Conversely, "[i]n the absence of such findings, a permit shall be granted." N.C. Gen. Stat. §113A-120(a)(6) & (8), and (b).

6. Southern Shores is subject to Chapter 160A, Article 19 "Planning and Regulation of Development," and its 2016 amendment to the zoning ordinances included the statement required by N.C. Gen. Stat. § 160A-383(b)(1) describing the amendments' "consistency with an adopted comprehensive plan and explaining why the action taken [was] reasonable and in the public interest." That statute provides that adoption of such statements "shall not be subject to judicial review."

7. Our Courts have recognized the "legislative" authority of elected city officials to enact zoning ordinances, and that, "Ordinarily, the only limitation upon this legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971); see also, *Pittsboro Matters, Inc. v. Town of Pittsboro*, 795 S.E.2d 615, 2016 WL 7984219, pg. 10 (N.C. Ct. App. 2016) [unpublished]; and, *Shore Acres Co. v. Town of Wrightsville Beach*, 196 N.C. App. 790, 675 S.E.2d 720, 2009 WL 1195038, 3 (2009) [unpublished]. In its regulatory review, it would have been incongruous the with Town's role and the intent of the Legislature for the Respondent to have interfered with the issuance of the subject permits.

8. The Respondent has shown with the undisputed facts that it did not act erroneously or fail to act as required by law or rule when it did not dispute the issuance of the permits at issue. There is no evidence of an environmental reason for rejecting the permits.

9. The Petitioners have failed to show that the Department of Environmental Quality had any obligation, or right, to withhold approval of the subject permits based on a decision of local elected officials resolving a conventional conflict between the aesthetics and economics of preservation versus new development.

10. Summary judgment is appropriate when the movant shows "that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "[T]he materiality determination rests on the substantive law[.]" *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). "A genuine issue of material fact is one that can be maintained by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion and means more than a scintilla or a permissible inference." *Ussery v. Branch Banking and Trust Co*., 368 N.C. 325, 335, 777 S.E.2d 272, 278-79 (2015) (citations omitted). Summary judgment is an issue of law and not of discretion. *Carr v. Great Lakes Carbon Corp.,* 49 N.C.App. 631, 633, 272 S.E.2d 374, 376 (1980), *disc. rev. denied,* 302 N.C. 217, 276 S.E.2d 914 (1981). All evidence must be viewed in the light most favorable to the non-moving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). "According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind–Com Elec. Co. v. First Union Nat. Bank,* 58 N.C.App. 215, 217, 293 S.E.2d 215, 216–17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden,* 238 N.C.App. 566, 768 S.E.2d 47, 57 (2014). "Summary judgment, when appropriate, may be rendered against the moving party." *Erthal v. May*, 223 N.C. App. 373, 387, 736 S.E.2d 514, 523 (2012). "An administrative law judge may grant …summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case." N.C. Gen. Stat. § 150B-34(e).

FINAL DECISION

There is no genuine issue of material fact to be determined, the Respondent is entitled to **SUMMARY JUDGMENT** as a matter of law, and the Petitioner's cross motion for summary judgment must be denied. N.C. Gen. Stat. §§ 1A-1, Rule 56; 150B-34(e); 26 NCAC 03 .0101(a).

Consequently, the Petitions must be, and hereby are, **DISMISSED.**

FINAL DECISION

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a

copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 12th day of August, 2019.

J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 12th day of August, 2019.

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